



REPUBLIC OF KENYA



KENYA LAW
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Theobald v Osani Community Health and Development Centre (Cause E005 of 2023) [2023] KEELRC 1550 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1550 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E005 OF 2023
CN BAARI, J
JUNE 29, 2023

BETWEEN

DR. AKILI BANGA THEOBALD CLAIMANT

AND

OSANI COMMUNITY HEALTH AND DEVELOPMENT CENTRE RESPONDENT

RULING

1. This ruling relates to the Respondent's Preliminary Objection dated February 2, 2023, and filed on February 9, 2023. The Respondent through the objection, seeks the striking out of the Claimant's suit premised on the grounds that the claim is bad in law, inadmissible and is incurably defective and incompetent for want of jurisdiction.
2. It is the Respondent's contention that the claim is a pure commercial dispute that emanates from a medical consultancy contract as opposed to a contract of employment, and hence this Court lacks the jurisdiction to hear and determine the claim.
3. The Respondent states that no employer and employee relationship existed between itself and the Claimant as to place this suit within the jurisdiction of this Court.
4. The Claimant opposed the objection through a replying affidavit sworn on February 21, 2023. It is the Claimant's position that he was employed by the Respondent as a medical superintendent vide a contract dated July 15, 2021, which took effect on July 19, 2021, on a gross salary of Kshs 90,000/-
5. The Claimant avers that his contract with the Respondent was again renewed in March, 2022, and his salary reviewed upwards to Kshs 111,000/-
6. It is the Claimant's assertion that having contested the Respondent's position that he was employed on consultancy basis, and having produced his employment contract, makes the issues in contestation



matters of facts which can only be proved upon a hearing, and hence the Preliminary Objection being a question of facts, cannot stand.

7. The Claimant states that the Preliminary Objection herein, does not meet the criteria set in law and should be dismissed.
8. Parties' request to canvass the objection through written submissions was granted. The Claimant filed submissions, and though the Respondent indicated during the mention for compliance that it had filed its submissions, none were actually filed.

Analysis and Determination

9. Upon careful consideration of the Preliminary Objection, the Claimant's replying affidavit and submissions, the issue for determination is whether this Court has jurisdiction to hear and determine this suit.
10. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696, the Court described a preliminary objection in the following words: -

“...A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” Sir Charles Newbold, P at Page 701 proceeded as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

11. The Respondent's contention is that the Claimant was a consultant, while the Claimant's position is that he was an employee of the Respondent, and has attached his appointment contract which stipulates his term and conditions of service.
12. The question for this Court is whether the issue subject of the objection is a pure point of law as to have the effect of disposing the suit.
13. Kimondo J in *Everret Aviation limited vs The Kenya Revenue Authority* (2013) eKLR, in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, held that the traditional tests of control of the work by the employer, and its integration into the employer's core business are no longer conclusive, and proceeded to hold that the fundamental behavior of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.
14. Further, courts have largely held that an employer/employee relationship is a matter of fact and which can only be confirmed upon hearing the parties to the suit. In *Ibrahim Ulalo v Nation Media Group* (2019) eKLR, the Court held thus:

“The contract between the parties where the nature of the relationship is contested is for the court to interpret. In the interpretation, the Court requires evidence of the nature of the relationship between the parties. An employment contract can be a matter of presumption based on the facts of the case. “



15. In my view and considering the issue subject of the preliminary objection herein, it is clear that the issue subject of the objection, is not one that can be determined at a preliminary stage, but one that can only be conclusively determined upon hearing both parties.
16. I conclude by holding that the preliminary objection does not meet the threshold set in the celebrated case of Mukisa Biscuit Manufacturing Co Ltd (*Supra*), and is thus lacking in merit and is dismissed.
17. Costs shall be in cause.
18. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF JUNE, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Okoth Odera present for the Claimant

Mr. Oduol present for the Respondent

Ms. Christine Omolo-C/A

